Affirmed 17-357
Field dissents — Justice Davis —
& Swayne

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~171~~. 257

ELIZA E. MASSEY, JOHN MASSEY, AND WILLIAM DOWNING, APPELLANTS,

vs.

JOHN A. ALLÉN, ASSIGNEE OF THE ESTATE OF WILLIAM DOWNING, A BANKRUPT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

FILED JANUARY 7, 1870.

Dec. 7, 1873

SUPREME COURT OF THE UNITED STATES.

No. 471.

ELIZA E. MASSEY, JOHN MASSEY, AND WILLIAM DOWNING, APPELLANTS,

vs.

JOHN A. ALLEN, ASSIGNEE OF THE ESTATE OF WILLIAM DOWNING, A BANKRUPT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

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1 MISSOURI DISTRICTS, *set:*

Pleas before the honorable circuit court of the United States for the districts of Missouri, at the April term thereof, A. D. 1870.

Appeal from U. S. district court for eastern district of Missouri.

JOHN A. ALLEN, ASSIGNEE, &C., COMPLAINANT & appellee,
against
ELIZA E. MASSEY, JOHN MASSEY, & WILLIAM DOWNING, defendants & appellants.

Be it remembered that, heretofore, to wit, on the fourth day of April, A. D. 1870, there was filed in the office of the clerk of the circuit court of the United States for the districts of Missouri a transcript of the record and proceedings had in the above-entitled cause in the district court of the United States for the eastern district of Missouri, which transcript is in the words and figures following, to wit:

Transcript from district court.

In the district court of the United States for the eastern district of Missouri.

Be it remembered that, on the twenty-third day of February, A. D. eighteen hundred and seventy, the following proceedings were had in the district court of the United States for the eastern district of Missouri, to wit:

JOHN A. ALLEN, ASSIGNEE OF WILLIAM DOWNING, bankrupt, plaintiff,
2 *against*
ELIZA E. MASSEY ET AL., DEFENDANTS. } In bankruptcy.

Order to show cause.

At Saint Louis, in said district, Wednesday, 23rd February, A. D. 1870, on the petition of John A. Allen, assignee aforesaid, this day filed herein:

It is ordered by the court that Eliza E. Massey, John Massey, and William Downing be and appear at this court at its rooms in the custom-house building, in the city of St. Louis, in said district, on Thursday, the tenth day of March, A. D. 1870, at eleven o'clock a. m., and show cause, if any there be, why a certain bill of sale executed by the said William Downing to the said Eliza E. Massey, of date 31st October, A. D. 1868, should not be set aside and declared void; and why the said Eliza E. Massey, John Massey, and William Downing should not deliver up to the said John A. Allen, as assignee aforesaid, the furniture and other personal property conveyed by the bill of sale aforesaid.

And it is further ordered that a copy of this order be served on each of the said Eliza E. Massey, John Massey, and William Downing, and that a copy of the said petition be delivered to the party first served.

And the said petition filed by the said John A. Allen, assignee aforesaid, is in the words and figures following, to wit:

Petition against Eliza E. Massey et al. to set aside bill of sale & for possession of furniture.

In the matter of William Downing, bankrupt. Case No. 784 in bankruptcy. In the district court of the United States for the eastern district of Missouri.

To the Honorable Samuel Treat, judge of said district court:

The petition of John A. Allen, assignee of the estate and effects of said bankrupt, William Downing, respectfully shows—

3 That said bankrupt, on the thirty-first day of October, A. D. (1868,) one thousand eight hundred and sixty-eight, was the owner of the following-described furniture and other personal property, then being in the residence of the said William Downing, situated on the north side of Washington avenue, east of Sixteenth street, in the city of St. Louis, in said district, the said house being numbered 1347, to wit:

In library, one rosewood secretary and status, one rosewood writing-table, one walnut table with marble top, one Turkish chair, one arm-chair (imitation of rosewood,) two mahogany chairs, one chandalier, one hundred and fifty volumes of miscellaneous books, and twenty-eight yards carpet. Also, in parlor, two pier-glasses, two small rosewood sofas, two rosewood easy chairs, four rosewood parlor chairs, two rosewood reception chairs, two marble-top tables, two statues, of Ruth and Rebecca, four oil paintings, one engraving, "Lady Washington's Reception," two engravings, "Past" and "Future," seventy-two yards of parlor carpet, four window cornice and curtains, one piano-forte, stool, and music, and two chandeliers. Also, in third-story back room, one chamber set, consisting of one bedstead, one bureau, one washstand, six chairs, one bed, one toilet set, and one carpet. Also, in second-story back room, one carpet, one mahogany bedstead, one bureau, one washstand, two arm-chairs, two stuff-back chairs, one mattrass, one what-not (imitation of rosewood.) Also, hall and stair carpets, one hat rack, gas fixtures in hall, one chandelier in dining-room, one dining-table, one sideboard, and lot of table and bed linen.

That said bankrupt, William Downing, on said thirty-first day of October, A. D. 1868, was in possession of said personal property, and on said day was indebted to Eliza E. Massey, or to her husband,

4 John Massey, the said Eliza E. Massey being the lawful wife of said John Massey, in the sum of thirty-six hundred dollars, in payment whereof the said bankrupt did, on said day last named, convey by bill of sale, in writing, unto said Eliza E. Massey all of the personal property aforesaid, to have and to hold the same, unto her the said Eliza E. Massey, and to her heirs and assigns forever, absolutely; but that, although such bill of sale for said property was so made and delivered to said Eliza E. Massey by the said bankrupt, yet the said property, nor any part thereof, was never actually delivered to said Eliza E. Massey, or to any one for her, by the said bankrupt, but the same has ever since that time been, and still is, at the residence of said bankrupt above mentioned, and is and has ever since the date of said bill of sale been jointly held and used by the said bankrupt and said Eliza E. Massey and her said husband John Massey; wherefore your petitioner alleges that the said bill of sale, and pretended transfer of said property aforesaid, is void by the terms of the statute of Missouri relating to fraudulent conveyances.

Your petitioner, therefore, prays for an order setting aside and de-

claring void the said bill of sale, and that said Eliza Massey and her said husband John Massey, and the said bankrupt William Downing, deliver up to your petitioner all and singular the said property, and that an order to show cause be issued against them, said Eliza E. Massey and her husband John Massey, and said William Downing, on this behalf, returnable at such time as may appear proper and be convenient, &c.

JOHN A. ALLEN, *Assignee, &c.*
By HITCHCOCK & LUBKE, *Att'ys.*

John A. Allen, assignee aforesaid, on oath, and upon information states that he believes the facts stated in the foregoing petition are true.

JOHN A. ALLEN.

Sworn to and subscribed before me this 22nd day of February, A. D. 1870.

LUCIEN EATON, *Register.*

And afterwards, to wit, on the twenty-eighth day of February, A. D. 1870, the marshal of the United States for the eastern district of Missouri, returned into said court a copy of the said order, to show cause, with his return thereon, which return is in the words and figures following, to wit:

Marshal's return on order to show cause.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Executed this writ by delivering a copy of the order, together with a copy of the petition, to the within-named William Downing, at St. Louis, in said district, February 26, 1870, and by leaving a copy of the order for the within-named Eliza E. Massey, and a copy thereof for the within-named John Massey, at their places of abode, at St. Louis, in said district, February 28, 1870.

C. A. NEWCOMB,
U. S. Marshal E. D. Mo.,
By J. SAUER, *Deputy.*

And afterwards, to wit, on the 24th day of March, A. D. 1870, the following further proceedings were had in said court in the above-entitled cause, to wit:

Answer filed by consent.

JOHN A. ALLEN, ASSIGNEE OF WILLIAM DOWNING, bankrupt, plaintiff,
against
ELIZA E. MASSEY ET AL., DEFENDANTS.
} No. 784. In bankruptcy.

AT ST. LOUIS, IN SAID DISTRICT,
Thursday, 24th March, A. D. 1870.

This day come the defendants herein, by attorney, and, with the consent of the attorney for the plaintiff, file their answer to the petition heretofore filed against them herein.

And the said answer of the said defendants is in the words and figures following, to wit:

In the district court of the United States for the eastern district of Missouri.

6 *Answer of defendants.*

JOHN A. ALLEN, ASSIGNEE OF THE ESTATE and effects of William Downing, bankrupt,
vs.
JOHN MASSEY & ELIZA E. MASSEY & WILLIAM Downing.
} In bankruptcy.

And now come the said def'ts, and, for answer to the petition of the pl'ff herein filed, say that it is true, as herein stated, that, on the 31st day of Oct., 1868, the said Downing was the owner & in possession of the property described in said petition, and that he was on that day indebted to the said Eliza E. Massey in the sum of thirty-six hundred dollars, and that, in payment thereof, the said Dow'ing did, on said last-mentioned day, convey by bill of sale in writing unto said Eliza Massey all of the property aforesaid; to have & to hold the same unto said Eliza E. Massey, & to her heirs and assigns forever, absolutely; but they deny that said property was never actually delivered to said *to said* Eliza E. Massey, or to any one for her, by the said Dow'ing, and deny that the same has ever since that time been, or that it still is, jointly held by the said Dow'ing and said Eliza E. Massey and her said husband, John Massey.

And they, further answering, state that, prior to the said purchase, the said Eliza E. Massey, being possessed of the sum of thirty-six hundred dollars & upwards in her own right, being the proceeds of real property descended to her on the death of her father, as part of his estate, loaned the same to the said Dow'ing, who, when the same was due & payable, sold, by bill of sale, duly executed & acknowledged, the property in said petition described to the said Eliza E. Massey, for & in consideration of her releasing & discharging him from the payment of the money so loaned him by her as aforesaid; that, upon the execution & delivery of said bill of sale, said Dow'ing delivered to said Eliza E. Massey the property in the petition described, & that she has ever since retained, & now has, the sole and exclusive possession thereof, and is the owner thereof, & that said Dow'ing has not, nor has he had since said sale aforesaid, any property or possession of or control over said property, or any part of it.

GEO. A. MADILL,
Att'y for D'f'ts.

7 And afterwards, to wit, on the twenty-fifth day of March, A. D. 1870. the following further proceedings were had in said court in said cause, to wit:

Cause heard and submitted.

JOHN A. ALLEN, ASSIGNEE OF WILLIAM DOWNing, bankrupt, plaintiff,
against
ELIZA E. MASSEY ET AL., DEFENDANTS.
} In bankruptcy.

AT ST. LOUIS, IN SAID DISTRICT,
Friday, 25th March, A. D. 1870.

This day come the parties herein, by their attorneys, and this cause

came on for hearing, and was heard and submitted to the court on the pleadings and proofs, and the court, not being fully advised of the premises, takes further time to consider of its judgment herein.

And afterwards, to wit, on the twenty-sixth day of March, A. D. 1870, the following further proceedings were had in said court in said cause, to wit:

Decree adjudging sale void, & ordering delivery of property to assignee.

JOHN A. ALLEN, ASSIGNEE OF WILLIAM DOWNING, bankrupt, plaintiff,
against
ELIZA E. MASSEY ET AL., DEFENDANTS. } In bankruptcy.

AT ST. LOUIS, IN SAID DISTRICT,
Saturday, 26th March, A. D. 1870.

This cause having been heretofore heard and submitted to the court, and the court being now fully advised of and concerning the premises,
8 it is ordered, adjudged, and decreed that the sale made by the defendant, William Downing, of date 31st October, 1868, to the defendant Eliza E. Massey, of the following-described furniture, and other personal property in the residence of said Downing, on the north side of Washington avenue, east of 16th street, in the city of St. Louis, and known as 1347 Washington avenue, to wit: In library, one rosewood secretary and status, one rosewood writing-table, one walnut table with marble top, one Turkish chair, one arm-chair, (imitation of rosewood,) two mahogany chairs, one chandelier, one hundred and fifty volumes of miscellaneous books, and twenty-eight yards carpet; also, in parlor, two pier glasses, two small rosewood sofas, two rosewood easy chairs, four rosewood parlor chairs, two rosewood reception chairs, two marble-top tables, two statues, of Ruth and Rebecca, four oil paintings, one engraving, "Lady Washington's Reception," two engravings, "Past" and "Future," seventy-two yards of parlor carpet, four window cornice and curtains, one piano-forte, stool, and music, and two chandaliers; also, in third-story back room, one chamber set, consisting of one bedstead, one bureau, one washstand, six chairs, one bed, one toilet set, and one carpet; also, in second-story back room, one carpet, one mahogany bedstead, one bureau, one washstand, two arm-chairs, two stuff-back chairs, one mattrass, one what-not, (imitation of rosewood;) also, hall and stair carpets, one hat-rack, gas fixtures in hall, one chandelier in dining-room, one dining-table, one sideboard, and one lot of table and bed linen, be, and said sale is hereby, adjudged void and for naught held.

And it is further ordered that said defendants, Eliza E. Massey, John Massey, and William Downing forthwith deliver to said plaintiff, as
9 assignee aforesaid, all of the said furniture and other personal property above described, and that the said defendants pay the costs in this behalf expended, and that execution or a fee-bill be issued therefor.

And afterwards, to wit, on the second day of April, A. D. 1870, the following further proceedings were had in said court in said cause, to wit:

Order allowing appeal to circuit court, &c.

JOHN A. ALLEN, ASSIGNEE OF WILLIAM DOWNING, bankrupt, plaintiff,
against
ELIZA E. MASSEY ET AL., DEFENDANTS.
} No. 784. In bankruptcy.

AT ST. LOUIS, IN SAID DISTRICT,
Saturday, 2nd April, A. D. 1870.

This day come the parties herein, by their respective attorneys, and the attorney for the defendants files a notice in writing to said plaintiff that they, said defendants, claim an appeal to the circuit court of the United States for the districts of Missouri from the decree rendered by this court herein, on the 26th day of March, A. D. 1870, with an acknowledgment, endorsed by plaintiff, on said notice, waiving all objections as to sufficiency of such notice, and agreeing to enter his appearance at the April term, A. D. 1870, of said circuit court, if said appeal is perfected by defendants.

And said defendants, by their attorney, move this court for leave to appeal to said circuit court to reverse the decree rendered herein by this court as aforesaid, on the 26th day of March, A. D. 1870, which leave is granted.

Thereupon said defendants, by their said attorney, present to the court their bond of appeal, which is approved by the court.

And thereupon it is ordered by the court that a transcript of the record and proceedings in this cause be certified to said circuit court.

And the said notice, with said acknowledgement thereon, is in the words and figures following, to wit:

Notice to pl'ff that def'ts claim an appeal from decision of judge of said dist. court.

In the district court of the United States for the eastern district of Missouri.

JOHN A. ALLEN, ASSIGNEE OF THE ESTATE OF William Downing, bankrupt,
vs.
ELIZA E. MASSEY, JOHN MASSEY, AND William Downing.
} In bankruptcy.

At St. Louis, in said district, on the 2nd day of April, A. D 1870.

To John A. Allen, plaintiff and assignee of said estate:

You are hereby notified that we claim an appeal from the decision of the judge of said court, made on the 26th day of March, 1870, in the above-entitled cause, in rendering a judgment and decree that the sale of the furniture and other personal property made by defendant Downing to defendant Eliza E. Massey, on the 31st day of October, A. D. 1868, and mentioned in your petition herein, be adjudged void and held for naught; and that these defendants deliver to you the possession of said property, to the circuit court of the United States to be holden at St. Louis, in said district, on the 1st Monday of April, A. D. 1870.

DANIEL DILLON,
Counsel for Defendants.

Acknowledgement of notice of appeal.

Receipt of a copy of this notice is hereby acknowledged, and all objections as to sufficiency of notice is waived; and I do hereby agree to enter my appearance at the April term, A. D. 1870, of the circuit court of the United States for the district of Missouri, if an appeal
11 is perfected by defendants.

April 2nd, 1870.

JOHN A. ALLEN,
Assignee, &c.
By HITCHCOCK & LUBKE,
Att'ys.

And the said bond of appeal, filed by said defendants, is in the words and figures following, to wit:

Bond of appeal.

Know all men by these presents that we, William Downing, as principal, and Henry Stagg, as surety, are held and firmly bound unto John A. Allen, assignee of the estate of William Downing, a bankrupt, in the full and just sum of four thousand dollars, to be paid to the said John A. Allen, assignee as aforesaid, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this second day of April, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately, at the February term of the district court of the United States for the eastern district of Missouri, in a suit depending in said court between John A. Allen, assignee of the estate of William Downing, a bankrupt, against Eliza E. Massey, John Massey, and William Downing, on the 26th day of April, A. D. 1870, a judgment was rendered against the said Eliza E. Massey, John Massey, and William Downing, and the said Eliza E. Massey, John Massey, and William Downing having obtained an appeal to the circuit court of the United States for district of Missouri;

Now, the condition of the above obligation is such, that if the said Eliza E. Massey, John Massey, and William Downing shall pros-
12 ecute said appeal to effect, and answer all damages and costs if they fail to make good their appeal, default be made in the delivery of the property, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM DOWNING. [SEAL.]
H. STAGG. [SEAL.]
[SEAL.]

Sealed and delivered in presence of and acknowledged before me this 2nd day of April, 1870.

BEN. F. HICKMAN,
Clerk U. S. Dist. Court.

Approved by—

SAMUEL TREAT,
Judge.

Deposition read on the hearing of the said cause.

The following evidence was read on the hearing of said cause, being part of a deposition made by William Downing, bankrupt, before Lucien Eaton, esquire, one of the registers in bankruptcy of the district court of the United States for the eastern district of Missouri, on the 14th day of February, 1870, to wit:

In the district court of the United States for the eastern district of Missouri. In bankruptcy. In the matter of William Downing, bankrupt, at office in St. Louis, in said district, on the 14th day of February, 1870, before Lucien Eaton, register.

Deposition of William Downing.

EASTERN DISTRICT OF MISSOURI, *ss:*

WILLIAM DOWNING, of St. Louis, in the county of St. Louis, and State of Missouri, being duly sworn, cautioned, and examined, at
13 the time and place above-mentioned, upon oath says:

Ques. Where do you reside?

A. I reside at 1347 Washington avenue, in St. Louis.

Ques. How long have you resided there?

A. I resided in that house, I believe it is five years now.

Ques. How large a house is it?

A. Three-story house.

Ques. How many rooms or apartments are there in it?

A. There's ten (10) rooms without the basement, I think.

Ques. Who furnished the house when you moved in?

A. I furnished part of it, Mrs. Massey, my sister-in-law, furnished part of it.

Ques. What proportion of the furniture and other things did you put in?

A. Well, I don't know as I can tell you exactly the proportion. We have lived together for eighteen or nineteen years. Mr. Massey a good deal of the time for the last ten years has been doing the marketing, and we lived together as one family. I furnished the house and they furnished the other things. Subsequently I sold Mrs. Massey most of the furniture that belonged to me.

Ques. What furniture at the start, or other things, did Mrs. Massey furnish?

A. Mrs. Massey furnished outright all the furniture in one room, and I think most of the furniture in the adjoining room. The two rooms in the first place belonged to her. Never did belong to me. Then there was one room up in the third story that never belonged to me
14 at all. It belonged to Mrs. Anable.

Ques. Then the furniture of three rooms in the house never belonged to you at all?

A. Never belonged to me except some pieces in one room. I can't tell you exactly what there was in that.

Ques. How much did that cost which you did furnish?

A. I can't tell you. I sold what I sold to Mrs. Massey for thirty-six hundred dollars, on the 28th day of October, 1868. I think that wasn't very far from the cost of it.

Ques. Well, on the 28th day of October, 1868, you sold all that was in there?

A. Excepting what I put in the schedules.
Ques. To Mrs. Massey?
A. All that belonged to me.
Ques. For 3,600 dollars?
A. Yes, sir; and delivered it to her. She has had it ever since.
Ques. After that sale you have continued residing in the same house?
A. Continued to reside in the same house; yes, sir.
Ques. And had the use of the same furniture?
A. Had the use of the same furniture; she had the use of it too.
Ques. Didn't she have the use of it before?
A. Yes, sir; she had the use of it before.
Ques. Did you deliver to her any writing to witness this transfer?
A. I did, sir; I had it acknowledged before a notary public.
Ques. What was it; a bill of sale?
A. A bill of sale acknowledged before a notary public, and I delivered to her the goods.
Ques. How was the delivery made?
A. Just passed it over to her; she simply lets me use them; I
15 have no more right to remove or sell them, or do anything with them, nor haven't had for fifteen months, than you have—not a bit.
Ques. Was this document recorded?
A. No, sir.
Ques. Never been recorded?
A. No, sir; not to my knowledge.
Ques. To whom was the bill of sale made?
A. To Mrs. Massey herself. It was Mrs. Massey who paid me the money. I owed Mrs. Massey the money at the time, 3,600 dollars—money that I had in trust for her. I wanted to use the money and I sold her the furniture and took the money. I had the money then in my possession and I sold her the furniture instead of paying her the money.
Ques. How did Mrs. Massey come to have this money?
A. How did she come to have it? She got part of it from a place she had sold in the east.
Ques. Well, the balance; how did she get that?
A. Well, the balance. She had part of it from her husband. Her husband went to California. He sent money home. She got the money and deposited it with me. I don't know exactly how Mrs. Massey got her money.
Ques. She deposited it with you; is that it?
A. She deposited it with me—loaned it to me.
Ques. You say a part of this money was received from her husband and a part from the sale of a piece of property?
A. I say part of it. (I think she gave the money to me.) She sold her house and lot last; she sold, or he did, and gave her the money.
Ques. It really came from Mr. Massey originally?
16 A. Yes, sir; I suppose it came from Mr. Massey—Mr Massey's estate. I suppose it did come from him.
Ques. Was the bill of sale made to a trustee for her?
A. No, sir; it was sold right out.
Ques. Plain bill of sale to her?
A. It occurred in this wise: Mr. Emerson let a note of mine go to protest unnecessarily, and I didn't know but it might cause me some trouble, so I sold the furniture to her there some 15 or 16 months ago. That's just the way it occurred, no dodging about it in any way. When they came up there they wanted me to invoice Mrs. Massey's furniture. I told them I wouldn't do it; I had no right to invoice her things

any more than my next door neighbor's, or anybody's things that I never owned. I put in everything in my schedule that I have, in any way, shape, or manner.

Ques. Who drew the bill of sale?

A. Mr. James H. Comfort, esq.

Ques. Was the schedule of property attached to the bill of sale?

A. I think so, as near as I recollect.

Ques. Specifying each article?

A. Yes, sir; I believe so; I couldn't say that they went into every particular, because I wasn't apprehending any difficulty in any way, shape, or manner.

Ques. Well, was any schedule attached?

A. Yes, sir; there was a schedule attached, I know that.

Ques. How long had you had the money from Mrs. Massey?

A. Well, I can't tell you; they had some of it. I had all of it for several years. I got it along from time to time. I can't tell you exactly how long.

Ques. Well, where did you keep that money?

17 A. I used it anywhere's, as I wanted to use it. I didn't keep it in my pocket. I wouldn't be paying the interest and keeping the money in my pocket.

Ques. You did not have any special deposit?

A. No, sir.

Ques. You had it in your funds?

A. I had it in my funds.

Ques. You say you made the transfer in consequence of a note of Downing and Emerson going to protest?

A. Yes, sir; the first note of Downing and Emerson going to protest, when I heard of it, I sold this property to Mrs. Massey. I think it was on the 28th day of October, 1868, at the same time I made a second deed of trust on my property there to raise money, if it was necessary. I guess they are dated the same date. Mr. Comfort made out the papers. These pieces of paper were subsequently passed over to Mr. Emerson.

Ques. On that day, or about that time, what was the amount of your bank account?

A. O, I don't recollect anything about that.

Ques. Did you have any cash on hand?

A. I don't know whether I had any cash on hand or not. I was handling money all the time. A man doing a business of half a million, how do you suppose I can tell?

Ques. Well, I would like to know?

A. I don't know whether I had any money on hand or not. I presume I did.

Ques. You have said the reason why you made the transfer was to enable you to be in funds to meet this draft?

A. Meet what draft?

18 Ques. Meet this paper that had gone to protest?

A. I didn't say any such thing, beg your pardon.

Ques. Well, why did you make the transfer?

A. In case anything should occur.

Ques. In other words to secure her?

A. Yes, sir; to secure her; put it in that way if you like.

Ques. Why was not the bill of sale recorded?

A. Well, I didn't know as it was necessary to record it.

Ques. Was there any question about that at all?

A. I don't think there was any question about it any way.
Ques. Did you ask Mrs. Massey not to record it?
A. I don't know that I did, I don't recollect.
Ques. Where is the bill of sale?
A. I suppose Mrs. Massey has it.
Ques. Have you seen it since you gave it to her?
A. I saw it about the time I made the transfer to *the* Mr. Kennan.
Ques. Was it in the house then?
A. It was in the house then. She was in the house then.
Ques. The bill of sale was there too?
A. I suppose it was, I didn't see where she brought it from. She had it in her possession.
Ques. Did you inform any one, or the public, of this transfer, so that it was made a public thing—any one know anything about it, excepting the parties that had a hand in the transfer?
A. I don't know that I told anybody, and I don't know but I did. I think I did tell Emerson.
Ques. Did you tell anybody else?
A. I don't know that I did. I didn't make anything specially private about it. If anybody asked me I should have told them. I
19 had no objections to anybody's knowing. I would just as soon they would know it was Mrs. Massey's furniture as mine. We had lived there together a great many years.
Ques. After this transfer was made did your relations towards Mrs. Massey, and the way the house was run or conducted, remain the same?
A. Just the same as it did before.
Ques. You provided as you did before for the household?
A. I don't know whether I did or not.
Ques. Did you make any arrangement or arrangements about it at all?
A. Never have made any arrangement; we settled it at the end of the year. I paid what he thought was right, and he paid what I thought was right.
Ques. All the same?
A. Yes, sir; and do yet.
Ques. You delivered the furniture to Mrs. Massey?
A. Yes, sir.
Ques. By what act was it done?
A. I took the common sense act. I sold her the furniture, took her around and showed her what there was; told her what I would sell it to her for; she bought it and I made out the bill of sale.
Ques. How long a time did you consume in doing that?
A. Well, I think it was—I can't say whether it commenced to-day, for instance—to-night, and came back the next evening to finish it.
Ques. Mr. Comfort?
A. Mr. Comfort.
Ques. He did that to get an inventory to make a bill of sale from?
A. Before this we took the inventory.
20 Ques. Mr. Comfort did that so he could draw the bill of sale?
A. I gave him the inventory. Mr. Comfort wasn't there then.
Ques. Who made this inventory?
A. I made it myself. Mrs. Massey was there. I made out the inventory and showed it to her.
Ques. Who suggested the transfer to her?
A. I suggested it myself.

Ques. She hadn't spoken to you about it?

A. No; not that I know of.

Ques. Was there any understanding entered into that you should pay her anything, or pay anything more, because of the change in the possession of the property?

A. Pay anything more? How do you mean?

Ques. You were the owner of that property before the transfer?

A. Yes.

Ques. Now you had her money on which you was to pay interest?

A. Yes.

Ques. You transferred the property to her to secure her?

A. Yes.

Ques. Now what were you to pay her after that?

A. I didn't pay her any more than I did before. It would be the same thing whether I had the money or the use of the furniture. I didn't pay her interest. We had no agreement about how we should divide our expenses.

Ques. Wasn't it understood between you that notwithstanding the transfer you would still continue as before, and you have the use of the furniture?

21 A. I don't think there was anything said about that. She has the use of the property, and we stay there just the same as we did before.

Ques. Wasn't it also understood that you were also to continue there as before, and have the use of it?

A. I don't think there was a word said about it, one way or the other.

Ques. There was no understanding in that respect at all?

A. I don't think there was.

Ques. What did you say to Mrs. Massey when you suggested the making of this transfer?

A. I said I owed her thirty-six hundred dollars, and I would sell her that furniture for it; that Emerson had let a note go to protest, and I didn't know what might grow out of that; but my course subsequently didn't show I had any intention of getting rid of paying anybody.

Ques. That is not exactly what we are talking about just now. What else was said?

A. I don't recollect; I wasn't looking forward to any time like this, and of course I don't recollect what might have been said on an occasion like that; I just state to you the facts: I sold to her that furniture to secure her that amount that I owed her honestly and justly. Now you have got the whole of it.

Ques. Didn't you know that thereafter you were to continue on as before in the housekeeping?

A. We expected to.

Ques. That was your expectation?

A. Yes, sir.

Ques. It was your expectation to have the use of the property the same as before?

22 A. Yes, sir; but if Mrs. Massey had seen fit to do otherwise—to move out the furniture—I shouldn't have had a word to say about it. I had no idea that she would do that, of course, as she had been living with us 15 or 16 years.

Ques. Well, you made this transfer to her, relying upon her letting you have the use of it as before?

A. I made the transfer to her to secure her that sum of money I owed her.

Ques. Did you expect she would take it away?

A. No; I didn't expect it. But if she had been pleased to take it away I wouldn't have said a word. I would have made some other kind of arrangement. The furniture was hers, and she had a right to do what she pleased with it.

Ques. You say you had been living together 12 years?

A. Been living together over eighteen years in that way—mostly in that way.

Ques. Whose name was at the door?

A. My name.

Ques. There still?

A. Yes, sir.

Ques. Was Mrs. Massey's or Mr. Anable's name at the door?

A. No, sir; neither of them.

Ques. Well, then, as between your friends, it was your house and household, and they were living with you previous to this transfer. Wasn't that the idea?

A. Well, they were living with me just as they are now.

Ques. Well, wasn't that the idea?

A. Yes, sir; we were living together.

Ques. Mr. Downing's residence, with Mr. Massey and his family, and Mr. Anable and his family living with you?

A. It was Mr. Downing's residence and was Mr. Downing's furniture, but he sold it to her, and we divided the expenses, as he and I
23 could afford at the end of the year. We didn't make any bargain about it; we went on in that way. When he wasn't able to pay much, I didn't charge them much. Mr. Massey attends to the marketing and pays the bills for going to market, and all that thing; at the end of the year we see what he has paid and what I have paid, and I generally divided it, what I thought was fair. Mr. Allen and I lived the same way 5 or 6 years; kept furniture together, only I happened to own a little more furniture this time than before, because I was better able to.

Ques. It was you who fixed the amount that they ought to pay at the end of the year, wasn't it, under this arrangement?

A. Yes, sir; I generally fixed that. I generally took the lion's share myself—always have done that with all my relations, and most every body I had to deal with. I never forced them any. I acted liberal towards——

Ques. What evidence did you give Mrs. Massey for this money that you had from her?

A. What evidence? I didn't give her any notes.

Ques. Any receipt?

A. She just trusted it to me. I don't believe she got any receipts. I don't recollect about it. When I got the money I credited it to her.

Ques. Did you put it on your books?

A. That is a private matter. No; I had some memorandum books I think I had it in. It wasn't on my business books.

Ques. Then everything, except that which was stated in this schedule as exempt, was included in that bill of sale?

24 A. Yes, sir; everything that I ever owned.

Ques. Did you have a settlement at the end of 1868—December, at the end of the year 1868?

A. I don't recollect that I did.

Ques. And did you have an apportionment between Mrs. Massey and yourself and Mr. Anable as to the amount?

A. Mr. Anable had nothing at all to do with it in any way, shape, or manner.

Ques. Did you have any adjustment—annual adjustment, at the end of the year 1868 with Mr. Massey?

A. I didn't always do it at the end of the year. It may have run two years.

Ques. Have you had any since the time of this transfer?

A. I think I have.

Ques. When?

A. I can't tell.

Ques. Well, give us somewhere near it.

A. I think it was—well, I can't tell; probably in July, I think it was—that I had any.

Ques. July last?

A. Yes, sir.

Ques. In making up that adjustment, did you make any allowance for the use of that furniture to Mr. Massey?

A. Didn't say a word about it.

Ques. Nothing said about it whatever?

A. No, sir; nothing said about it in any way.

Ques. You say 3,600 dollars was the value of the furniture you transferred?

A. I think so. I think it was a fair price.

Ques. Wasn't it worth more?

A. No, sir; I don't think it was.

Ques. Didn't you fix upon that valuation of it because that was the amount of money that you owed Mrs. Massey?

A. No, sir; I put in furniture enough that I thought would cover that.

Ques. Enough to cover it?

A. Yes, sir.

Ques. Can you give me a list of that furniture?

A. No, sir; I can't give you a list of it now. Mrs. Massey can give you a list of it. I have nothing at all to do with it any way. I gave him all the furniture I could, but if there's anything else there you want you will have to take it from somebody else besides me. That's all I've got to say about that.

Ques. What is Mrs. Massey's first name?

A. Eliza E. Massey.

The witness before signing this examination desires to add by way of explanation, that the thirty-six hundred dollars which he received from Mrs. Massey came from the administrator of her father's estate, and the sale of a piece of real estate in Massachusetts.

WILLIAM DOWNING.

Taken before me, and subscribed by the bankrupt March 9th, 1870, in my presence.

LUCIEN EATON,
Register.

The following copy bill of sale was read in evidence on the hearing of said cause:

(Copy.)

Know all men by these presents that I, William Downing, of the

city and county of St. Louis and State of Missouri, for and in
26 consideration of the sum of three thousand six hundred and forty-five dollars, to me in hand paid by Eliza E. Massey of the said city, county, and State, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, and sell unto her, the said Eliza E. Massey, the following described furniture and other personal property now owned by me, and being in my residence, situated on the north side of Washington avenue, east of Sixteenth street, in the city of St. Louis, and known as No. 1347 Washington avenue, to wit:

In library, one rosewood secretary and status, one rosewood writing-table, one walnut table with marble top, one Turkish chair, one arm chair, (imitation of rosewood,) two mahogany chairs, one chandalier, one hundred and fifty volumes of miscellaneous books, and twenty-eight yards carpet. Also, in parlor, two pier glasses, two small rosewood sofas, two rosewood easy chairs, four rosewood parlor chairs, two rosewood reception chairs, two marble-top tables, two statues, of Ruth and Rebecca, four oil paintings, one engraving, Lady Washington's Reception, two engravings, Past and Future, seventy-two yards of parlor carpet, four window cornice and curtains, one piano-forte, stool, and music, and two chandaliers. Also, third-story back room, one chamber set, consisting of one bedstead, one bureau, one wash-stand, six chairs, one bed, one toilet set, and one carpet. Also, in second-story back room, one carpet, one mahogany bedstead, one bureau, one wash-stand, two arm chairs, two stuff-back chairs, one mattress, one what-not, (imitation of rosewood.) Also, hall and stair carpets, one hat-rack, gas fixtures in hall, one chandalier in dining-room, one dining-table, one sideboard, and lot of table and bed linen:

To have and to hold the above-described personal property and every part thereof, unto her, the said Eliza E. Massey, and to her heirs
27 and assigns forever.

In witness whereof I have hereunto set my hand and seal, this thirty-first day of October, eighteen hundred and sixty-eight.

WILLIAM DOWNING. [SEAL]

Executed in presence of—
JAMES H. COMFORT.

STATE OF MISSOURI,
County of St. Louis.

Be it remembered that, on this thirty-first day of October, eighteen hundred and sixty-eight, before me, the undersigned, a notary public within and for the county of St. Louis aforesaid, came William Downing, who is personally known to me to be the same person whose name is subscribed to the within and foregoing instrument of writing as a party thereto, and acknowledged the same to be his act and deed for the purpose therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my official seal at office, in the city of St. Louis, the day and year last aforesaid.

JAMES H. COMFORT,
Notary Public, St. Louis County, Missouri.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Benjamin F. Hickman, clerk of the district court of the United States in and for the eastern district of Missouri, do hereby certify the

writing hereto annexed to be a true copy of the record and pro-
28 ceedings in case of John A. Allen, assignee of William Downing, plaintiff, against Eliza E. Massey et al., defendants, in bankruptcy, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this second day of April, in the year of our Lord eighteen hundred and seventy.

[SEAL.] BEN. F. HICKMAN,
Clerk of said Court.

And afterwards, to wit, at a regular stated term of the said circuit court, begun and holden at the city of St. Louis, on Monday, the 4th day of April, A. D. 1870, the following further proceedings took place in said cause on Wednesday, the 20th day of April, A. D. 1870, to wit:

Cause heard and order taking same under advisement.

JOHN A. ALLEN, ASSIGNEE, &C., COMPLAINANT & appellee,
ag'st
ELIZA E. MASSEY ET AL., DEFENDANTS & appellants. } In chancery.

This day come the parties, by their respective solicitors, and this cause having been brought on for hearing at the present term of this court, and the same having been fully heard, argued, and submitted to the court for a decree upon the record and proceedings in the district court of the United States for the eastern district of Missouri, and upon the cause as made out and presented to this court, and the court not being fully advised of and concerning the premises, said cause is by the court taken under advisement.

MEMORANDUM.—His honor Judge Treat did not sit or take part in the proceedings in said cause.

29 And afterwards, to wit, at a regular stated term of the said circuit court, begun and holden at the city of St. Louis, on Monday, the 4th day of April, A. D. 1870, the following further proceedings took place in said cause, on Thursday, the 21st day of April, A. D. 1870, to wit:

Decree affirming decision of district court.

JOHN A. ALLEN, ASSIGNEE, &C., complainant & appellee.
ag'st
ELIZA E. MASSEY ET AL., DEfendants & appellants. } In chancery.

This day come the parties, by their respective solicitors, and this cause having been heard at a former day of this term, and having been taken under advisement by the court, and the court being now fully advised of and concerning the premises, doth now finally order, adjudge, and decree that the judgment or decree rendered in this cause by the district court of the United States for the eastern district of Missouri,

be and the same is now hereby affirmed. And it is further ordered, adjudged, and decreed that the defendants & appellants, Eliza E. Massey, John Massey, and William Downing, pay the costs of the appeal of said cause from said district court, and that execution or a fee-bill for such costs be issued against said defendants and appellants, and against Henry Stagg, the surety on the bond of appeal herein.

MEMORANDUM.—His Honor, Judge Treat, did not sit or take part in the proceedings in said cause.

And afterwards, to wit, at a regular stated term of the said circuit court, begun and holden at the city of St. Louis, on Monday, the 4th day of April, A. D. 1870, the following further proceedings took place in said cause on Saturday, the 30th day of April, A. D. 1870, to wit:

30 *Order allowing appeal to Supreme Court.*

JOHN A. ALLEN, ASSIGNEE, &C., complainant and appellee, *ag'st* ELIZA E. MASSEY, ET AL., DEfendants & appellants. } In chancery.

This day come the said defendants & appellants, by their solicitor, and move the court for leave to appeal to the Supreme Court of the United States from the judgment or decree rendered in this cause, which appeal is allowed. And thereupon said defendants and appellants present to the court their bond of appeal in the sum of five thousand dollars, executed by William Downing, as principal, and Carlos S. Greeley, George F. Tower, and Eustace H. Smith, as sureties, which bond is approved and ordered to be filed of record in this cause; and it is further ordered that the record and proceedings in said cause be certified and transmitted to said Supreme Court.

Which bond, referred to in the last foregoing order, is as follows, to wit:

Bond of appeal.

Know all men by these presents that we, William Downing, as principal, and Carlos S. Greeley, Geo. F. Tower, & Eustace H. Smith, as sureties, are held and firmly bound unto John A. Allen, assignee of the estate of William Downing, a bankrupt, in the full and just sum of five thousand dollars, to be paid to the said John A. Allen, as such assignee as aforesaid, his successor or successors, as such assignee, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this thirtieth day of April, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately, at the April term, A. D. 1870, of the circuit
31 court of the United States for the districts of Missouri, in a suit depending in said court, between John A. Allen, assignee of the estate of William Downing, a bankrupt, plaintiff, and William Downing, Eliza E. Massey, and John Massey, defendants, a decree and judgment were rendered against the said Eliza E. Massey, John Massey, and William Downing, and the said Eliza E. Massey, John Massey, and

writing hereto annexed to be a true copy of the record and pro-
28 ceedings in case of John A. Allen, assignee of William Downing, plaintiff, against Eliza E. Massey et al., defendants, in bankruptcy, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this second day of April, in the year of our Lord eighteen hundred and seventy.

[SEAL.] BEN. F. HICKMAN,
Clerk of said Court.

And afterwards, to wit, at a regular stated term of the said circuit court, begun and holden at the city of St. Louis, on Monday, the 4th day of April, A. D. 1870, the following further proceedings took place in said cause on Wednesday, the 20th day of April, A. D. 1870, to wit:

Cause heard and order taking same under advisement.

JOHN A. ALLEN, ASSIGNEE, &C., COMPLAINANT & appellee, *ag'st* ELIZA E. MASSEY ET AL., DEFENDANTS & APPELLANTS. } In chancery.

This day come the parties, by their respective solicitors, and this cause having been brought on for hearing at the present term of this court, and the same having been fully heard, argued, and submitted to the court for a decree upon the record and proceedings in the district court of the United States for the eastern district of Missouri, and upon the cause as made out and presented to this court, and the court not being fully advised of and concerning the premises, said cause is by the court taken under advisement.

MEMORANDUM.—His honor Judge Treat did not sit or take part in the proceedings in said cause.

29 And afterwards, to wit, at a regular stated term of the said circuit court, begun and holden at the city of St. Louis, on Monday, the 4th day of April, A. D. 1870, the following further proceedings took place in said cause, on Thursday, the 21st day of April, A. D. 1870, to wit:

Decree affirming decision of district court.

JOHN A. ALLEN, ASSIGNEE, &C., complainant & appellee. *ag'st* ELIZA E. MASSEY ET AL., DEFENDANTS & APPELLANTS. } In chancery.

This day come the parties, by their respective solicitors, and this cause having been heard at a former day of this term, and having been taken under advisement by the court, and the court being now fully advised of and concerning the premises, doth now finally order, adjudge, and decree that the judgment or decree rendered in this cause by the district court of the United States for the eastern district of Missouri,

be and the same is now hereby affirmed. And it is further ordered, adjudged, and decreed that the defendants & appellants, Eliza E. Massey, John Massey, and William Downing, pay the costs of the appeal of said cause from said district court, and that execution or a fee-bill for such costs be issued against said defendants and appellants, and against Henry Stagg, the surety on the bond of appeal herein.

MEMORANDUM.—His Honor, Judge Treat, did not sit or take part in the proceedings in said cause.

And afterwards, to wit, at a regular stated term of the said circuit court, begun and holden at the city of St. Louis, on Monday, the 4th day of April, A. D. 1870, the following further proceedings took place in said cause on Saturday, the 30th day of April, A. D. 1870, to wit:

30 *Order allowing appeal to Supreme Court.*

JOHN A. ALLEN, ASSIGNEE, &C., complainant and appellee, *ag'st* ELIZA E. MASSEY, ET AL., DEfendants & appellants. } In chancery.

This day come the said defendants & appellants, by their solicitor, and move the court for leave to appeal to the Supreme Court of the United States from the judgment or decree rendered in this cause, which appeal is allowed. And thereupon said defendants and appellants present to the court their bond of appeal in the sum of five thousand dollars, executed by William Downing, as principal, and Carlos S. Greeley, George F. Tower, and Eustace H. Smith, as sureties, which bond is approved and ordered to be filed of record in this cause; and it is further ordered that the record and proceedings in said cause be certified and transmitted to said Supreme Court.

Which bond, referred to in the last foregoing order, is as follows, to wit:

Bond of appeal.

Know all men by these presents that we, William Downing, as principal, and Carlos S. Greeley, Geo. F. Tower, & Eustace H. Smith, as sureties, are held and firmly bound unto John A. Allen, assignee of the estate of William Downing, a bankrupt, in the full and just sum of five thousand dollars, to be paid to the said John A. Allen, as such assignee as aforesaid, his successor or successors, as such assignee, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this thirtieth day of April, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately, at the April term, A. D. 1870, of the circuit
31 court of the United States for the districts of Missouri, in a suit depending in said court, between John A. Allen, assignee of the estate of William Downing, a bankrupt, plaintiff, and William Downing, Eliza E. Massey, and John Massey, defendants, a decree and judgment were rendered against the said Eliza E. Massey, John Massey, and William Downing, and the said Eliza E. Massey, John Massey, and

William Downing, have prosecuted their appeal to the Supreme Court of the United States of America to reverse the decree and judgment ni the aforesaid suit:

Now, the condition of the above obligation is such, that if the said Eliza E. Massey, John Massey, and William Downing, shall prosecute said appeal to effect, and answer all damages and costs if they fail to make good their appeal, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM DOWNING. [SEAL.]
CARLOS S. GREELEY. [SEAL.]
GEO. F. TOWER. [SEAL.]
EUSTACE H. SMITH. [SEAL.]

Sealed and delivered in presence of—

Approved by—

SAMUEL TREAT, *Judge.*

UNITED STATES OF AMERICA,
Circuit Court for the Districts of Missouri, ss:

I, Benjamin F. Hickman, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the writing hereto annexed to be a transcript of the record and proceedings in the cause in equity of John A. Allen, assignee, &c., complainant and appellee, against Eliza E. Massey et al., defendants and appellants,
32 as fully as the same remain on file and of record in said case, in my office.

In witness whereof I hereunto subscribe my name, and affix the seal of said court, at office in the city of St. Louis, in said districts, this twenty-fourth day of June, in the year of our Lord, eighteen hundred and seventy.

[SEAL.]

BEN. F. HICKMAN,
Clerk of said Court.

(Indorsement on cover:) No. 471. Eliza E. Massey, John Massey, and William Downing, appellants, vs. John A. Allen, assignee of the estate of W'm Downing, a bankrupt. Missouri C. C. U. S. Filed 7th January, 1871.

IN THE SUPREME COURT

OF THE UNITED STATES.

ELIZA E. MASSEY, JOHN MASSEY, and WILLIAM DOWNING,
Appellants

vs.

JOHN A. ALLEN, Assignee of
WILLIAM DOWNING, a Bankrupt,
Appellee.

Appeal from the the Circuit Court of the United States for the Districts of Missouri.

STATEMENT, BRIEF AND ARGUMENT OF APPELLANTS.

Barns & Beynon. St. Louis Printing House, 215 Pine St.

IN THE SUPREME COURT

OF THE UNITED STATES.

ELIZA E. MASSEY, JOHN MASSEY, and WILLIAM DOWNING,
Appellants.

vs.

JOHN A. ALLEN, Assignee of WILLIAM DOWNING, a Bankrupt,
Appellee.

APPELLANTS' ABSTRACT OF THE PLEADINGS AND PROOFS.

In February, 1870, appellee, as assignee of William Downing, a bankrupt, filed his petition, or bill in equity, in the District Court of the United States for the Eastern District of Missouri, alleging that the bankrupt, on the 31st day of October 1868, being indebted to Eliza E. Massey or her husband John Massey, in the sum of $3600, did, in payment of said indebtedness, convey to said Eliza E. Massey, by bill of sale in writing, certain personal property and furniture in said petition or bill described, but that said property had never been delivered to said Eliza E. Massey, but had ever since said sale been at the residence of the said bankrupt and jointly held and used by said bankrupt and said Eliza E. Massey and her husband John Massey, and praying that said sale be declared void and set aside and that appellants be required to deliver said property to appellee, as said assignee, for the reason that said sale was void under the statute of the State of Missouri in relation to fraudulent conveyances.

Appellants, by their answer, admitted the conveyance and the execution and delivery of the bill of sale, but denied that the property had never been delivered to said Eliza E. Massey, and further alleged that said property was purchased by her in good faith for the sum of $3600 and over, and that upon said sale said Downing delivered to her said property, and that she had ever since been in the possession and had sole, exclusive, control of it.

The only evidence adduced was the said bill of sale and the deposition or examination of said William Downing, which, in substance, shows that at the time of said sale the bankrupt and his family and John Massey (the husband of Eliza E. Massey) and his family were living together in the same house, and had been living together in this way about 18 years and for about 5 years next previous to the sale in the same house in which they were living at the time of this sale; that when they moved into this house Downing furnished part of it, and Massey a part, Downing furnishing the articles which were the subject of this sale, and which were principally furniture for the parlor, library, dining room, halls and stairways; that both families used and occupied the parlor, library and dining-room alike and made equal use of the furniture of these rooms; that Massey did the marketing and paid the bills for household expenses, and attended to matters about the house, he and Downing making settlements from time to time and dividing the household expenses between them; that at the time of the sale Downing was indebted to Mrs. Massey (Eliza E. Massey), in the sum of $3600 and over for money which she had received from her father's estate and from the sale of some real estate, and which money she had loaned to Downing; that in payment of this indebtedn ess Downing sold to her the furniture in controversy in this suit; that at the time of the sale Downing and Mrs. Massey went around and looked at the different articles of furniture, took an inventory of it, agreed upon the price; and completed the transaction by Downing turning over to her the furniture and executing and delivering to her a bill of sale duly acknowledged before a Notary Public; that after the sale both families continued to occupy the house and use the furniture as before; the furniture, however, being subject to the absolute and sole control of Mrs. Massey.

The District Court rendered a decree setting aside the sale and ordering appellants to deliver up the property to appellee. From this decree appellants appealed to the Circuit Court for the Districts

of Missouri. The last named Court affirmed the decree of the District Court, and appellants bring the case by appeal to this Court.

The errors complained of by appellants and upon which they rely for a reversal of the decree of the Court below are:

1st. The bill should have been dismissed for want of equity.

2d. The bill should have been dismissed for want of jurisdiction, there being a plain, adequate and complete remedy at law.

3d. Upon the evidence the decree should have been in favor of appellants.

POINTS AND AUTHORITIES RELIED UPON BY APPELLANTS.

I. There is no equity in the bill. It does not allege that there was any fraud, nor does it deny that the sale was bona fide and for a valuable and adequate consideration, and that the bankrupt's estate received the full benefit of this consideration, and yet, without offering to return the consideration, appellee asks a Court of equity to set aside the sale and give him possession of the property. He asks to be permitted to retain the consideration and take the property too. Courts of equity do not aid such purposes. He who seeks equity must do equity.

1 Story Eq. Jurisprudence, sec. 64 e.
Parker *vs.* Holmes, 2 Hill Chancery R., 95.
Ridgway *vs.* Hays, 5 Cranch C. C. Rep., 23.
Stanley *vs.* Gadsby et al., 10 Pet., 521.

(*a*) Where there is no actual and intentional fraud, but constructive fraud only, such as being contrary to the policy or provissions of a particular statute, courts of equity do not set aside a sale without requiring the consideration to be repaid. They let the sale stand as security for the consideration.

Herne *vs.* Meers, 1 Vern. 465.
Boyd *vs.* Dunlap, 1 John, Ch. Rep. 481 & 482.
Bean *vs.* Smith et al, 2 Mason 296.
Bromley *vs.* Smith et al, 5 Nat. Bankrupt Reg. 152.

II. When there is a plain, adequate and complete remedy at law, a suit in equity cannot be sustained in any of the U. S. Courts, and this objection need not be raised by demurrer, but the Court for this reason will dismiss the bill at any time and even *sua sponte*.

Hipp et al *vs.* Babin et al., 19 Howard, 277 & 278.
Parker *vs.* Winz L. C. & W. Co., 2 Black, 545.
Wright *vs.* Ellison, 1 Wallace, 22.

If appellee has any remedy at all in this case it is purely a legal one, and the remedy at law is plain, adequate and complete. If the sale complained of is void as against appellee, then he has a clear legal title to the property and can bring his action of replevin to recover the specific property, or of trover to recover its value.

III. Under the circumstances of the case, the delivery and change of possession were sufficient to meet the requirements of the statute. The property at the time of the sale was in joint possession of vendor and vendee. They went around, examined the property, made out a list of it, agreed upon the price, and vendor turned over the property to vendee and gave her a bill of sale of it duly acknowledged and which fully described the property sold, and after the sale ven-

dee was in possession of the property and had absolute and sole control of it. To require anything more under the circumstances, would be to render a sale of this property between these parties impossible, unless Mrs. Massey should remove the furniture from the house, and thus be deprived of the use of property which she had bought and paid for, or unless Massey and his family should move from the house taking this furniture with them, or Downing and his family should move from the house leaving the Masseys and the furniture behind, and thus break up relations which had existed for 18 years. The law requires nothing so unreasonable.

Steward *vs.* Lambe, 1 Brod. & Bingh, 506.
McVicker *vs.* May, 3 Penn., St. 224.

(*a*) In reference to the effect of leaving personal property in possession of vendor after sale, two rules have existed from an early period—one, the strict rule, holding such possession *conclusive* evidence of fraud, the other and more liberal rule holding such possession to be but a badge of fraud and susceptible of explanation. All that was intended to be effected by the Missouri statute was to establish the strict rule for the guidance of the Courts of that state, (see page 448 of 42 Mo.). This statute established no new rule as to what should be deemed a delivery or change of possession, these being left, as before, to depend upon all the circumstances of the case, such as the situation of the property and of the parties &c. Decisions on what constitute delivery and change of possession are authorities under the statute, it not coming into operation until it has first been decided that there was not a delivery and change of possession. As to what has been held to be a delivery and change of possession where the property or parties were peculiarly situated. see

Burton *vs.* Thornhil', 41 Taunton, 149.
Stewart *vs.* Lambe, 1 Brod. & Bingh, 506.
Ludlow *vs.* Ward, 19 Johns, 218.
Archer *vs.* Hubbell, 4 Wend., 514.
Bessell *vs.* Hopkins, 3 Cowen, 166 & note.

Hamill *vs.* Willett, 6 Bosworth, 534.
McVicker *vs.* May, 3 Penn. St., 224.
Born *vs.* Shaw, 29 Penn. St. 292
Fank *vs.* Staats, 24 Ill., 646.
Kenningham *vs.* Laughton, 3 Monroe 30, 7 Monroe,99.
Hutchins *ve.*Gilchrist, 23 Vermont 82.
Clayton *vs.* Brown, 17 Georgia, 217.
Waldoe *vs.* Dall, 29 Cal., 556.
State to use of Heed *vs.* King, 44 Mo., 239.

The statute expressly states that regard must be had to the situation of the property, and this would necessarily be so even if the statute was silent on this point, (see language of Court in State to use &c. *vs.* Heed, 44 Mo.,on page 241). Appellee contends that the statute requires regard to be had to the situation of the *property* but not to the situation of the *parties*. In the first place it may be said that if the statute was silent on this point regard must be had to the situation of the parties quite as necessarily as to the situation of the property. But the distinction attempted to be drawn does not seem to be a substantial one, for, you are to regard the situation of the property in reference to what? more especialiy in reference to the situation and relation of the parties. So that in regarding the situation of the property you necessarily regard the situation of the parties, and especially their situation with reference to the property.

(*b*) The property being in the joint possession of vendor and vendee at the time of the sale makes this case similar in principle to cases of sales by one partner or joint owner to another, and it should be so regarded in determining what was a sufficient delivery and change of possession.

Story on Sales, sec. 312 a.
Shurtleff *vs.* Willard, 19 Pick, 202.
Hamill *vs.* Willett, 9 Bosworth, 534.

(*c*) Some stress was laid by the Court below on the fact that the bill of sale was not recorded. There was not at the time of the sale, nor is there yet, any law in Missouri requiring, or even authorizing bills of sale of personal property to be recorded. It would have been a senseless and futile act to have done so, as it could not be held to impart notice to any one. The only effect it could have had would have been to cast a suspicion over the transaction by showing that the parties were overly anxious to *appear* to be acting openly and fairly.

IIII. The sale being unquestionably bona fide and valid between the bankrupt and his vendee, and the bankrupts estate having received the full value of the property, and there being no fraud upon, or violation of, the provisions of the bankrupt act, and no fraud of any kind being perpetrated or even intended, the assignee stands in the same position in reference to this property as the bankrupt himself did at the commencement of bankruptcy proceedings. In cases not coming within any of the provissions of the bankrupt act, and when there is no *actual* fraud, the assignee takes the property subject to the same equities which existed against the bankrupt.

Crawford *vs.* London Dock Co., 2 Cromp. & M. 686.,
Millons Appeal, 32 Penn. St., 121.
Winsor *vs.* McLellan, 2 Story R., 493.
Mitchel *vs.* Winslow, 2 Story R. 630, and cases refered to by Judge Story in his opinion in this case.
In Re Griffith, 3 Nat. Bankrupt Reg., 179.
Patterson, Denison & Co. *vs.* Coggershall, 4 N. B. Reg., 19.
Brombey *vs.* Smith, 5 N. B. Reg., 152.

(*a*) There is nothing in the pleadings or in the evidence tending to show that this property will be required to pay the debts proved up against the bankrupt's estate. If this property is not required to pay such debts, surely the assignee ought not to be permitted to interfere with this sale. For suspension of his commercial paper or some other cause, a man may be, and men frequently are, forced nto bankruptcy when they have ample property to pay all their

debts. It certainly is not too much, in a case like this, to require the assignee to show affirmatively that the property sought to be recovered is required to pay the debts proved up against the bankrupt's estate.

ARGUMENT.

Appellee does not deny the bona fides of the sale, nor that full value was received by Downing for the property sold, nor does he claim that the sale is affected by any provision of the bankrupt act, but he rests his case solely on the gronnd that there were no such delivery and change of possession as were required by the statute of the State of Missouri in reference to sales of personal property.

The case of Claflin *vs.* Rosenberg, 42 Mo., is what appellee relies upon. It is admitted that there are some expressions made use of by the Judge in giving the opinion of the Court in that case, which seem to favor a harsh construction of the statute, but the Court in more recent decisions adopt a more liberal rule,and certainly indi-

cates no disposition to be governed by anything more than than the point actually involved and passed upon in that case. See the State to use of Heed *vs.* King, 44 Mo.,238. But admitting the correctness of the decision in the case of Claflin *vs.* Rosenberg, it is not difficult to distinguish between that case and this. In that case the goods at the time of, and before the sale, were in the sole and open possession of vendor, in his store for sale, with himself behind the counter, and after the sale they continued in his sole and open possession in his same store,with his business sign over the door and himself still behind the counter engaged in selling the goods. People were fully justified in beleiving that the goods were his,and had no reason to think that any one else had any right to, or control over them, and would be warranted in giving him credit on the faith of his ownership of the property. But in this case there was nothing to warrant the conclusion that the property ever belonged to Downing. It was never held out to the public as his property. He was never in the sole possession of it. Neither did the situation of the property nor the manner in which it was used authorize any such conclusion. There is nothing disclosed ir this case which would warrant the conclusion that the house in which the property was situated belong to Downing any more than to Massey. Indeed the presumption was that it did not belong to either, but was rented, for in large cities not one in ten, even of buisness men, own the houses they reside in, but pay rent. It is evident that Downing did not own the house, as the pleadings and evidence show that he was in possession of it at the commencement of this suit, which could hardly be, so long after he was adjudicated a bankrupt, if the house was his property. Nor did Downing occupy the house first and Massey move in afterwards, which might raise a presumption that Downing was the proprietor, but both families moved into the house at the same time, and each supplied a part of the furniture. There were much stronger reasons to conclude that the furniture in that house belonged to Massey. He and his family moved into it when it was first occupied by these parties, and had continued to reside in it. He did the marketing, paid the household bills, attended to household matters, and was the representative man of the establishment.

Appellee is not fair in his statement of the substance of Downing's deposition. There is nothing in that deposition to warrant the statement that the house in which the furniture was at the time of the

sale was known in the community as Downing's residence, and that the Masseys were living with him. There is more warrant for stating that the house was known in the community as Massey's residence and that the Downings were living with him. The truth is the house was known in the community as the residence of both families, and it was as much Downings living with Massey as Masseys living with Downing. The Court will bear in mind, in reading Downings deposition, that it was taken *ex parte* before a Register under the provision of the bankrupt act providing for examination of bankrupts, and the Court will observe that an effort was made by the assignee, by suggesting answers, &c., to elicit such answers as he desired.

Appellee in this suit, as assignee of the bankrupt, without even offering to restore the consideration money the benefit of which the bankrupt's estate fully enjoyed, seeks in a Court of *equity* to recover property which had been sold in good faith and for full value more than a year before any proceedings in bankruptcy were commenced, and which ever since the sale has been in the possession and under the sole control of the purchaser, because, owing to the peculiar situation of the families of the bankrupt and his vendee, both occupying the same house before and after the sale, the vendee suffered the bankrupt to use the property conjointly with the vendee, and this too when vendee had used the property conjointly with bankrupt for at least 5 years next before the sale. The simple statement of appellee's case sounds so harsh and unreasonable that the mind would hesitate long before it would believe it to be law, and never can be induced to believe it to be *equity*.

Respectfully submitted

JOHN M. KRUM,
DANIEL DILLON,
of Counsel for Appellants.

IN THE SUPREME COURT
OF THE UNITED STATES.

ELIZA E. MASSEY, JOHN MASSEY and WILLIAM DOWNING, *Appellants,*

vs.

JOHN A. ALLEN, Assignee of WILLIAM DOWNING, a Bankrupt, *Appellee.*

Appeal from United States Circuit Court for Missouri Districts.

BRIEF FOR APPELLEE.

Henry Hitchcock with

GEORGE W. LUBKE,
PRESTON PLAYER,
Of Counsel.

IN THE SUPREME COURT

OF THE UNITED STATES.

Appeal from the Circuit Court of the United States for the Districts of Missouri.

ELIZA E. MASSEY, JOHN MASSEY, and WILLIAM DOWNING,
Appellants.

vs.

JOHN A. ALLEN, Assignee of WILLIAM DOWNING, a Bankrupt,
Appellee.

STATEMENT OF THE CASE.

The appellee, as assignee in Bankruptcy of the estate of William Downing, filed a petition in the District Court of the United States for the Eastern District of Missouri, against the appellants, representing that on the 31st of October 1868, the said Downing, the bankrupt, who is also one of the appellants in this case, was the owner of a lot of furniture, and other moveable personal property then situated in the residence of said Downing, numbered 1347 Washing-

ton Avenue, in the city of St. Louis, a detailed description of the furniture and property being set forth in the petition: that said bankrupt, on the 31st of October 1868, was in possession of said property, and being indebted to the appellant, Eliza E. Massey, or her husband John Massey, in the sum of $3,600, the bankrupt executed on said day to said Eliza E. Massey a bill of sale of all of said property, to have and to hold the same unto her and to her heirs and assigns forever, absolutely; that although the said bill of sale was made and delivered, yet no part of the said property was ever actually delivered to said appellant, Eliza E. Massey, but that the same had ever since the date of said bill of sale. and up to the filing of said petition, been at the residence of said bankrupt, and that said bankrupt had held and used the same jointly with the said Eliza E. Massey and her husband; that therefore said bill of sale and pretended transfer of said property was void by the terms of the statute of Missouri relating to fraudulent conveyances.

The prayer of the petition is that the bill of sale be declared void, and that the appellants be ordered to deliver up all the said property to the appellee; and for the proper process.

Upon the filing of this petition the District Court ordered the appellants to show cause on the 10th of March 1870 why the prayer of this petition should not be granted. This order having been served upon the appellants they appeared in court on the 24th of March 1870, and filed a joint answer to the petition. In this answer the appellants admit that the bankrupt owned the property mentioned in the peti-

tion and that he executed and delivered the bill of sale of it to the appellant Eliza E. Massey; but they denied that the property was never actually delivered to her or to any one for her by the bankrupt, and they also denied that he had held it jointly with her as charged in the petition. The answer further alleges that, prior to the execution and delivery of the bill of sale, the appellant, Eliza E. Massey, was possessed in her own right of the sum of $3,600, which she loaned to said bankrupt, who executed and delivered to her in payment of the loan, the bill of sale; and that he also delivered to her the property described in the bill of sale and that she thereafter retained the sole and exclusive possession of it, and that the bankrupt had not at any time after the execution of the bill of sale been in possession of or had any property in or control over the property, or of any part of it.

Upon these pleadings the case was tried by the District Court, the testimony adduced being simply the deposition of the bankrupt and the bill of sale. The District Court, on the 26th of March 1870, entered a decree setting aside the bill of sale and ordering the appellants to deliver up the property to the appellee. On the 2d of April following, the appellants perfected an appeal of the case to the Circuit Court for the Districts of Missouri. That court heard the case, and affirmed the decree and order of the District Court, April 21st 1870, and the appellants, on the 30th of April 1870, perfected an appeal from the decree of the Circuit Court to this Court.

The bill of sale is correctly described in the pleadings. The substance of Downing's deposition is as follows:

That the appellants Eliza E. Massey and her husband, had lived with Downing about fifteen years, the greater part of that time at 1347 Washington Avenue, where they were still living at the commencement of this action; that Downing's name was on the door-plate of the house, and the house was known in the community as his residence and that the Masseys were living with him, both before and after the execution of the bill of sale; that Downing was doing a large mercantile business in partnership with one Emerson at the date of the bill of sale; that a note of the partnership went to protest, and that Downing, fearing difficulties on that account, and being indebted to Mrs. Massey in the sum of $3,600, for money which she had deposited with him from time to time, he suggested to her the execution of a bill of sale as payment or security to her for that indebtedness; that thereupon he had the bill of sale prepared, executed and acknowledged it, and delivered it to her, she retaining it in the house and not recording it; that the property described in the bill of sale was worth about $3,600; that no actual delivery of the property was ever made to Mrs. Massey, no action was taken to apprise the public in any way of any change of the ownership of the property and that after the delivery of the bill of sale, the property remained in the same place, both parties using and enjoying it in every respect as though no change of ownership had taken place—Downing ex-

pecting that this would be so when he executed the bill of sale; and that this was the position of the propety at the time when this action was commenced.

An inventory was taken solely for the purpose of giving a proper description of the property for the preparation of the bill of sale, but no act was done, either before or after the delivery of the bill of sale, whereby the public could have known of the change of ownership.

POINTS AND AUTHORITIES FOR THE APPELLEE.

I. The bill of sale is void as against the creditors of Downing, the bankrupt, under the 10th section of chapter 107, page 440, of the Revised Statutes of Missouri of 1865. That section is as follows:

"Every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time (regard being had to the situation of the property) and be followed by an actual and continued change of possession of the things sold, shall be held to be fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith."

That section of the Missouri Statute was in force at the date of the bill of sale, and is still in existence.

The Supreme Court of Missouri in construeing this section have held that it necessarily implies that as against the vendor the possession must be EXCLUSIVELY in the vendee, the language of the Court being that "although the statute does not use the word *exclusive*, it necessarily implies it, and it is obviously essential to carry out its plain intention."

Claflin *vs.* Rosenberg, 42 Mo., p. 439.
State to use &c. *vs.* King, 44 Ibid, p. 238.
Lesem *vs.* Herriford, 44 Ibid, p. 323.
State to use &c. *vs.* Schulein, 45 Ibid, p. 521.

(*a*) In the case at bar there was no delivery at all at any time, although up to the commencement of this action sixteen months had elapsed since the execution of the bill of sale.

The taking of the invoice was no delivery, because it was done before the sale, and because its purpose was not a delivery of the property but the preparation of the bill of sale.

(*b*) And the case at bar is brought completely within the statute and the opinion of the Supreme Court in Claflin *vs* Rosenberg, by the indisputable fact that after the sale Downing retained the possession of the property jointly with the vendee without the character of his possession being made known to the public by any *circumstance* or *indicia* of change of ownership whatsoever.

(*c*) The statute, in requiring a delivery within a reasonable time after the sale regard being had to the situation of the *property* does not refer to the situation of the *parties*.

II. This court will take judicial notice of and enforce the statute above cited.

McCluny *vs*. Silliman, 3 Pet. 270.
Ennis *vs*. Smith, 14 How. 400.

And this court is also bound by the construction which the Supreme court of Missouri has given that

statute. The interpretation becomes a part of the statute.

Nichols *vs.* Levy, 5 Wall, 433.
Christy *vs.* Pridgeon, 4 Wall, 197.
Shelly *vs.* Guy, 11 Wheaton 361.
Also cases cited p. 61 of Abbot's National Digest. Vol. II.

III. The appellee is entitled to the relief given him by the decree of the court below.

(*a*) By section 14 of the Bankrupt act of 1867, there is vested in him by the assignment in bankruptcy, "all the property conveyed by the bankrupt in fraud of his creditors."

This provision relates solely to State statutes against fraudulent conveyances.

Bradshaw *vs.* Klein, 1 Bankrupt Reg. 146.
S. C. 7 A. L. Reg. 505.

And is not restricted in any sense by sec. 35 of the same act. See also

In re Meyers 1 Bank. Reg. 162.
In re Manley 3 Bank. Reg. 75.
Goodwin *vs.* Sharkey, 3 Bank. Reg. 138.
In re Wynne ,4 Bank. Reg. 5.
S. C. 9. A. L. Reg. 627.

In this last case Chase, Ch. J. (Virginia Circuit), delivering the opinion, states, "It may be, and we think it is true, that if the deed had remained unrecorded when the petition in bankruptcy was filed the title of the assignee would prevail against any claim under the deed, *for the assignee represents the creditors*, and the statute of Virginia expressly declares any deed of trust void as to creditors, until and except from the time it is duly admitted to record."

See also,

Bank of Leavenworth *vs.* Hunt, 11 Wall. p. 391.

(*b*) Without this provision in the Bankrupt act the appellee would be entitled to this relief if the construction given the act of 1841 is to be followed at this time.

Carr *vs.* Hilton, 1 Curtis C. C. R. 233.
Hilliard on Bankruptcy p. 134, section 43.

Respectfully submitted by

Henry Hitchcock

GEORGE W. LUBKE,
PRESTON PLAYER,
of Counsel for the Appellee.

APPENDIX.

Opinion of the Circuit Court in the above case.

DILLON, J.—Neither in his petition nor in argument does the assignee base his right to the relief demanded upon the ground that the bankrupt did not in fact owe Mrs. Massey the debt which the bill of sale was made to pay or secure, nor upon the ground that the sale was fraudulent because made to hinder and delay the creditors of Downing, the vendor.

The assignee places his case solely upon the statute of the State of Missouri relating to Fraudulent Conveyances, the tenth section of which is in these words:

"Every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time (regard being had to the situation of the property), and be followed by an actual and continued change of possession of the things sold, shall be held to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith." Sts. 1865, p. 440, ch. 107.

The sale by the bankrupt to Mrs. Massey is within the statute. It was an absolute sale of goods in the possession of the vendor. There was no delivery of the property, or if any, but a momentary one, and it was not followed by any actual or continued change of possession. This being so, the statute enacts that the sale "shall be held to be fraudulent and void as against the creditors of the vendor, or subsequent purchasers in good faith."

With the policy of a statute which, irrespective of the fact of the fraud or the intention of the parties to defraud, inexorably denounces as fraudulent *per se*, all sales not accompanied by the required delivery and by actual and continued change of possession, the courts have nothing to do, and it does not become them to question the legeslative wisdom.

The purpose of the statute is to prevent the vendor from acquiring a false and delusive credit, and to prevent purchasers from being ensnared by means of secret sales.

Hence the provision that the sale shall, as required, be accompanied with delivery, and this by an actual and continued change of possession. The purpose of this enactment being to protect the public from deception, the *indicia* of a change of owners should be such as to accomplish this end. The new owner should fly his own and not his vendor's flag. This is the construction which the statute has received from the Supreme Court of the State. In *Claflin* v. *Rosenberg*, 42 Mo. R., 439, speaking of this statute, Wagner, J., remarks that "the vendee must take actual possession, and the possession must be open, notorious, and unequivocal, such as to apprise the community, or those who are accostumed to deal with the party, that the goods have changed hands, * * This necessarily excludes the idea of a joint or concurrent possession."

On a critical examination of the case just cited, it will be seen that the exact point of the decision is that the possession of the vendee must, as against the vendor, be actual and *exclusive*.

This is the leading case upon the statute in question, and it has been subsequently reaffirmed and followed. *Claflin* v. *Rosenberg*, 43 Mo. 593; *State, etc.*, v. *King*, 44 Id. 238; *Lessem* v. *Herriford*, Id. 323. See Twyne's case and American Notes, 1 Smith Lead Cas. 33.

We deem it prudent to observe that in the case at bar, it is not necessary to go so far as to say that in no case can a sale be upheld where the vendor is in possession concurrently with, or rather subordinate to, the vendee or his agent. This may depend upon the existence of the circumstances of a nature fairly to put the public upon notice.

In this case there was no actual delivery, no continued change of possession, *no circumstances of any kind*, whereby either creditors or purchasers could know that any change of owners had taken place.

The defendants make a point that the situation of the parties to the sale and the property was such that no delivery and change

of possession other than such as were made was practicable, and hence more ought not to be required.

The statute refers to "the situation of the property," not of the parties; but, without emphasizing this suggestion, it seems to us that the statute has reference to property so situated as not to be at the time capable of immediate actual delivery and change of possession, such as growing crops, bulky articles, etc., and not to cases where the property is present and capable of being delivered to the vendee and retained in his possession and control.

Since in a case like the present, this Court will follow the construction given to the local statute by the highest court of the State, it is not deemed necessary to follow the appellant's counsel into an examination of the decisions under the statute of Elizabeth or the statutes of other States.

The defendants also contend that even if such be the construction of the statute, the assignee has no right to impeach the sale and have the property delivered to him. This view cannot be maintained. If Downing had not gone into bankruptcy, any creditor of his could have subjected the property to the payment of his debt. In this respect the assignee represents the creditors. In consequence of Downing being adjudicated a bankrupt, his creditors are precluded from proceeding against him, and hence the assignee has the right given him in terms by the Bankrupt Act, to proceed in the way which the present plaintiff is pursuing. *Carr* v. *Hilton*, 1 Curtis, C. C. R. 233. Hillard on Bankr. 134, sec. 43, and cases cited; Bankrupt Act, 1867, secs. 14, 35.

The result is that the order of the District Court must be affirmed.

KREKEL, J., concurs.

[See page 40 of vol. 1, Dillon's Circuit Court Reports.]